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No. 83-888

In the Supreme Court of the United States

OCTOBER TERM, 1983

FELIX S. JACOB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the description of items to be seized in the search warrant involved here satisfied the particularity requirement of the Fourth Amendment.

2. Whether the seizure of items not described in the warrant, but found in plain view, violated the Fourth Amendment.

3. Whether the courts below correctly concluded that permitting the government to amend the information did not prejudice petitioner in any way.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 39a-41a) is reported at 718 F.2d 1093. An earlier opinion of the court of appeals (Pet. App. 11a-18a) is reported at 657 F.2d 49. The first opinion of the district court (Pet. App. 1a-10a) is reported at 502 F. Supp. 1221. The opinion of the district court on remand (Pet. App. 20a-38a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1983. The petition for a writ of certiorari was filed on November 29, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial on stipulated facts in the United States District Court for the District of Maryland, petitioner was convicted of filing a false tax return, in violation of 26 U.S.C. 7206(1). He was sentenced to 60 days' imprisonment. The court of appeals affirmed (Pet. App. 39a-41a).

1. In 1974, the United States Attorney for the District of Maryland began an investigation of insurance fraud in connection with personal injury claims arising from automobile accidents. The investigation revealed that certain doctors and lawyers, including petitioner and Dr. Julius Gluck, conspired to submit false medical expense reports to certain insurance companies for the purpose of inflating out-of-court settlements and retaining that portion of the settlement proceeds that exceeded actual medical expenses (Pet. App. 12a, 20a-22a). Based upon the affidavit of an investigator working on the case, United States Postal Inspector Mock, a warrant was issued on April 26, 1979, authorizing the search of petitioner's law office for the following (Pet. App. 13a-14a):

> [L]edgers, journals, bank statements, checks, cancelled or otherwise, check vouchers, check stubs, checkbooks, deposit tickets, savings account books, for escrow account, regular account and any and all other checking and savings bank accounts, settlement sheets and other records of settlement for the time period January 1, 1972 through December 31, 1977, which relate to:
>
> 1. Clients who were represented by Felix S. Jacob and treated by Dr. Julius C. Gluck, in connection with claims for bodily injuries arising out of automobile accidents.

2. Clients who were represented by Felix S. Jacob in connection with claims for bodily injuries arising out of automobile accidents and which claims were made against persons insured by:

a. The Nationwide Mutual Insurance Company in which [* * *] acted as the adjuster for that company;

b. The Maryland Automobile Insurance Fund in which [* * *] acted as the adjuster for that company; and

c. The Maryland Casualty Company in which [* * *] acted as the adjuster for that company. [1]

which ledgers, journals, bank statements, checks, cancelled or otherwise, check vouchers, check stubs, checkbooks, deposit tickets, savings account books, for escrow account, regular account and any and all other checking and savings bank accounts, settlement sheets and other records of settlement with respect to clients represented in connection with claims for bodily injury arising out of automobile accidents for the time period of January 1, 1972 through December 31, 1977, show or tend to show evidence of violations of federal criminal law including but not limited to mail fraud in violation of 18 U.S.C. § 1341.

The warrant was issued at approximately 5:00 p.m. (Pet. App. 23a-24a). Six federal agents immediately went to petitioner's law office to execute the warrant. After awaiting the arrival of petitioner's attorney, the search began (*id.* at 24a). The agents seized 88 adding machine tapes, each of which reflected amounts disbursed in the settlement of a case in the category described in the warrant and contained

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[1]The names of the adjusters were ordered excised from the public record by the district court (Pet. App. 13a n.1).

handwritten notations indicating the party paid and the date of the settlement. They also seized petitioner's journal containing information respecting the disbursement of settlement funds and all cancelled checks for the law firm's escrow and checking accounts for the period 1972-1979. *Id.* at 25a-26a.[2] The cancelled checks were stored in boxes, but the district court found that they were not completely organized (*id.* at 26a). As a result, the agents decided to remove the boxes from petitioner's law office for examination in the morning (Pet. App. 27a).[3]

The following morning the agents began to sort and organize the checks in an effort to match them to the 88 cases identified from the search of petitioner's client files. Once the checks were arranged by check number, the agents began to review them and discovered a pattern of "double checking."[4] The investigation preceding issuance of the warrant had revealed that "double checking" was a practice commonly used to conceal the fraud. The pattern initially uncovered by the agents in sorting the checks did not relate to the clients specifically described in the warrant, but the agents nevertheless held the checks aside because they

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[2]The agents also seized petitioner's 1975 tax worksheet, but that was not introduced into evidence (Pet. App. 26a n.10).

[3]Additional factors influencing the agents' decision to remove the boxes were the lateness of the hour (after midnight), the generally confused atmosphere in petitioner's office, the agents' perception that petitioner was interfering with the search, the desire of petitioner's attorney to leave, and petitioner's consent that each box of checks would be itemized as a unit on the inventory (Pet. App. 27a).

[4]"Double checking" refers to the practice of issuing two checks payable to the client, while in fact only one check is actually received by the client. The other check, representing the difference between the doctor's inflated bill and the amount actually paid to him, would be negotiated by the attorney who would retain its proceeds in cash. See Pet. App. 21a.

believed the checks were evidence of other crimes committed by petitioner. The continued review of the checks ultimately located the checks relating to the 88 cases for which the agents had adding machine tapes and that related to the categories described in the warrant. Pet. App. 27a-28a.

2. A criminal information was filed against petitioner on June 11, 1980, charging him with filing an individual federal tax return for the tax year 1975 that was false in that it understated taxable income, in violation of Section 7206(1) of the Internal Revenue Code of 1954 (26 U.S.C.). The principal evidence supporting the charge consisted of the "double checks" seized from the check boxes, which did not relate to the clients described in the warrant (Pet. App. 28a). Prior to trial, petitioner entered into a stipulation providing that petitioner would stand guilty of the charge of filing a false tax return if his suppression motion were denied (*id.* at 39a-40a).

3. The district court granted petitioner's motion to suppress the evidence seized during the search (Pet. App. 1a-10a). The court held that the language of the warrant describing the records to be seized as showing evidence of violations of federal criminal law including "but not limited to" mail fraud was too general with regard to the description of the crimes involved and did not limit the discretion of the searching officers as to the records to be seized. The court of appeals reversed that holding but it remanded the case for findings as to the scope of the search (*id.* at 11a-18a). The court held that, taking the warrant as a whole, the items to be seized were described with sufficient particularity and that the phrase in question was properly treated as "superfluous" (*id.* at 17a).

On remand, the district court found that the scope of the search did not violate the Fourth Amendment (Pet. App. 20a-38a). Specifically, the court held that the removal of the

boxes from petitioner's law office was lawful because the boxes constituted single items containing documents subject to seizure under the warrant. The court noted that the agents' action was further justified by the refusal of petitioner's attorney to vouch for the security of the records if the agents left the boxes in petitioner's office overnight and by the agents' good faith belief that the search was being hampered by petitioner's conduct in moving files designated by the agents for further review. *Id.* at 34a-38a. In addition, the court upheld, under the plain view doctrine, the seizure of the "double checks" that were not related to the clients described in the warrant (*id.* at 29a-34a). The court of appeals affirmed on the basis of the district court's opinion (*id.* at 39a-41a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Accordingly, review by this Court is unwarranted.

1. Relying upon *Andresen* v. *Maryland*, 427 U.S. 463 (1976), and *United States* v. *Burch*, 432 F. Supp. 961 (D. Del. 1977), aff'd, 577 F.2d 729 (3d Cir. 1978), petitioner contends (Pet. 6-8) that the warrant authorizing the search of his law office was a general warrant and therefore repugnant to the Fourth Amendment. Specifically, petitioner argues that the phrase "but not limited to mail fraud" in the warrant's description of the crimes evidenced by the records to be seized is an overbroad description of the crimes involved and destroys the specificity of the warrant. This contention was correctly rejected by the court of appeals on petitioner's first appeal.

The search warrant in this case was quite detailed and set forth the items to be searched for and seized with particularity. See Pet. App. 13a-14a; pages 2-3, *supra*. It clearly limited the search to specific categories of financial records for the

period between January 1, 1972, and December 31, 1977, that related to personal injury claims arising from automobile accidents in which petitioner's client was treated by a particular doctor or was insured by one of three insurance companies, where the company was represented by a certain named adjuster. The documents to be seized thus were restricted by category, time, and the involvement of particular individuals in the claims. Consequently, the items to be seized were described with particularity and necessarily were related to the specific crime of mail fraud, for which probable cause had been shown. The search warrant clearly did not authorize a general search. Thus, the court of appeals correctly held that the specificity of the warrant was not destroyed by the phrase "but not limited to" in the tail of the warrant.

The court's decision in *Andresen* plainly supports this result. The crux of the Court's decision there was that a general description in the "tail" of a warrant would not render invalid an otherwise particular and carefully circumscribed description of the items to be seized, where the context makes clear that no general search is intended. 427 U.S. at 481-482. As long as the warrant considered as a whole meets the particularity requirement, a superfluous general phrase will not convert it into an impermissible general warrant.[5]

2. Petitioner further contends (Pet. 8-10) that the court of appeals' decision upholding the seizure of items not described in the warrant but discovered in plain view during the course of the execution of the warrant conflicts with *United States* v. *Apker*, 705 F.2d 293 (8th Cir. 1983). This contention is wholly without merit.

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[5]Petitioner's reliance on *Burch* is similarly misplaced because in that case there was no detailed description of the items to be seized.

The *Apker* decision relied upon by petitioner was reversed en banc by the Eighth Circuit. *United States* v. *Fitzgerald*, No. 82-1242 (Dec. 7, 1983), cert. denied, No. 83-600 (Jan. 23, 1984), petition for cert. pending, No. 83-1285. As the court of appeals explained in *Fitzgerald*, the seizure of incriminating items found in plain view by officers lawfully present is clearly authorized by the decisions of this Court (slip op. 4; see, *e.g.*, *Texas* v. *Brown*, No. 81-419 (Apr. 19, 1983)) and fully accords with the decisions of other courts of appeals relied upon by petitioner (see *Fitzgerald* slip op. 5-6 n.3). Here, the district court correctly explained that all the prerequisites for application of the plain view doctrine were satisfied: the officers were legitimately present in petitioner's law office by virtue of the search warrant; the "double checks" were discovered inadvertently in the course of organizing the lawfully seized checks; and the agents had probable cause to believe the checks were evidence of a crime. See Pet. App. 30a-34a.

3. Petitioner contends in conclusory fashion (Pet. 10) that he was denied due process because of the district court's failure to permit a new plea to allegedly amended charges.[6] This contention is insubstantial and was correctly rejected by the courts below (see Pet. App. 41a). Petitioner stipulated prior to trial that, if the items seized during the search

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[6]Following the district court's ruling admitting into evidence the items taken in the search, the government presented petitioner's 1975 tax return and an agreement between the parties signed by petitioner as well as by his attorney, wherein petitioner admitted he was guilty of the crime charged in the information. The government then rested its case. Petitioner thereupon moved for a judgment of acquittal on the ground that a stipulation of facts attached to the written agreement, which admitted a misstatement of gross income, failed to prove an understatement of taxable income, as charged in the information. The court at that point allowed the government to amend the information to address this technicality by adding a charge that business income as well as taxable income was understated.

were not suppressed, he was guilty of the charge set forth in the information and the evidence was sufficient to sustain a finding of guilt. See *id.* at 40a n.1. Under these circumstances, his argument in the trial court that the stipulation did not establish the crime charged in the information (because the stipulation referred to an misstatement of *gross* income while the information charged a misstatement of *taxable* income) was frivolous. Allowing the government to amend the information to address this technicality by charging a misstatement of business income as well did not prejudice petitioner in any way.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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